Supreme Court, U.S.
FILED
NOV 21 1994
OFFICE OF THE CLERK

No. 94-317

In the Supreme Court of the United States

OCTOBER TERM, 1994

NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the anti-injunction provisions of 12 U.S.C. 1821(j) (Supp. V 1993), as applied by 12 U.S.C. 1823(d)(3)(A) to certain actions of the Federal Deposit Insurance Corporation in acquiring and disposing of the assets of a failed depository institution, deprive the courts of jurisdiction to provide injunctive or declaratory relief to a plaintiff that alleges a violation of the National Historic Preservation Act, 16 U.S.C. 470 *et seq.*, but that asserts no monetary claim that could be resolved through available alternative administrative or judicial proceedings.

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OPINIONS BELOW

The final opinion of the court of appeals (Pet. App. B1-B10) is reported at 21 F.3d 469. The initial (and reinstated) opinion of the court of appeals (Pet. App. A1-A14) is reported at 995 F.2d 238. The order of the court of appeals vacating the initial opinion and granting rehearing (Pet. App. C1) is reported at 5 F.3d 567. The order of the court of appeals discharging its prior order to show cause on the issue of mootness and denying petitioner's suggestion of rehearing en banc (App., *infra*, 1a-2a) is unreported, as is that court's order entering an administrative stay pending resolution of petitioners' motion for a stay pending appeal (App., *infra*, 3a-4a). The

opinion and order of the district court granting a temporary restraining order (Pet. App. E1-E7) and its later order dismissing the case for lack of jurisdiction (Pet. App. D1) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1994. On June 17, 1994, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including August 20, 1994. The petition was filed on August 19, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Deposit Insurance Corporation (FDIC) plays an important role in safeguarding the soundness and stability of the nation's banking system. In discharging its responsibilities, the FDIC operates in at least two distinct capacities. First, in its "corporate" capacity the FDIC insures deposits, monitors the safety and soundness of insured banks and savings associations, and exercises certain other regulatory authority. See, *e.g.*, 12 U.S.C. 1811, 1814-1821(a), 1828 (1988 & Supp. V 1993); see generally *FDIC* v. *Bank of Boulder*, 911 F.2d 1466, 1469-1471 (10th Cir. 1990), cert. denied, 499 U.S. 904 (1991); *FDIC* v. *Nichols*, 885 F.2d 633, 636 (9th Cir. 1989). Second, under certain circumstances the FDIC is authorized to act in the capacity of conservator or receiver for a failed or failing depository institution. See 12 U.S.C. 1821(c) (1988 & Supp. V 1993).

The statute also provides that where an insured institution has failed or is threatened with failure, the FDIC may support the institution, or facilitate its reorganization or sale as a going concern, by providing various forms of direct financial assistance. 12 U.S.C.

1823 (1988 & Supp. V 1993). That assistance may take the form of a purchase of assets by the FDIC from the institution or from its conservator, liquidator or receiver—including from the FDIC itself in its capacity as conservator or receiver. See 12 U.S.C. 1823(c) and (d) (1988 & Supp. V 1993). Such purchases are made by the FDIC in its own, "corporate" capacity. With respect to assets so acquired, however, 12 U.S.C. 1823(d)(3)(A) provides that the FDIC "shall have all of the rights, powers, privileges, and authorities of the [FDIC] as receiver under sections 1821 and 1825(b) of [Title 12]."

2. In 1985, RepublicBank Dallas, N.A., made a loan secured in part by a deed of trust covering certain property in Dallas, Texas, including the headquarters of the Dr. Pepper Company. C.A. App. 43; Pet. C.A. Br. 5. The bank's corporate successor later became insolvent, and in 1988 the Comptroller of the Currency appointed the FDIC to act as its receiver. C.A. App. 43. The FDIC, as receiver, transferred various assets of the failed bank, including the deed of trust, to a newly created "bridge bank" (see 12 U.S.C. 1821(n)(1)(A) (Supp. V 1993)) that eventually became NCNB Texas National Bank (NCNB Texas). In its continuing effort to mitigate losses to the federal insurance system, the FDIC also provided financial assistance to NCNB Texas, in accordance with 12 U.S.C. 1823(c). Under the assistance agreement, NCNB Texas had a contractual right to require that the FDIC repurchase certain of the transferred assets at a later date. See C.A. App. 43-44.

In 1991, NCNB Texas exercised its option and the FDIC accordingly repurchased a variety of the transferred assets for approximately $2.5 billion. In the interim, NCNB Texas had foreclosed on the loan secured by the 1985 deed of trust, and the assets reacquired by the FDIC included title to the Dallas property and the

Dr. Pepper building. See C.A. App. 44. In 1992, the Dallas Area Rapid Transit Authority completed condemnation proceedings on part of the Dr. Pepper parcel, resulting in impeded access to the building and other changes potentially affecting the building's value. *Id.* at 39. In early 1993, as part of its liquidation of the assets repurchased from NCNB Texas, the FDIC agreed to sell the remainder of the Dr. Pepper property to Dal-Mac Investment Corporation, the high bidder in a public sealed-bid auction. Pet. App. E2; C.A. App. 39-40. Closing of the sale was scheduled for May 10. In March, 1993, Dal-Mac applied for a permit to demolish the Dr. Pepper building. That application was later withdrawn. Pet. App. E2.

3. Petitioners brought this action seeking injunctive and declaratory relief to prohibit the FDIC from selling the Dr. Pepper building without first complying with the requirements of Section 106 of the National Historic Preservation Act of 1966 (NHPA), 16 U.S.C. 470f. That Section requires that any "Federal agency" with jurisdiction over a proposed "Federal or federally assisted undertaking" consider the effect of that undertaking on any property eligible for listing on the National Register of Historic Places. As part of its consider-ation, the agency "shall afford the Advisory Council on Historic Preservation established under [the NHPA] a reasonable opportunity to comment with regard to such undertaking." *Ibid.*

The district court granted a temporary restraining order prohibiting consummation of the sale on May 10, and set a hearing on May 14, 1993. Following that hearing, however, the court held (Pet. App. D1) that it was precluded from granting injunctive relief in this case by the terms of 12 U.S.C. 1821(j) (Supp. V 1993), which provides that except as otherwise specified

elsewhere in Section 1821, "no court may take any action * * * to restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or a receiver." The court therefore denied petitioners' motion for a preliminary injunction and dismissed the action for lack of jurisdiction. Pet. App. D1.

After expedited briefing (during which the court entered an interim order (App., *infra*, 3a-4a) prohibiting the sale), the court of appeals initially denied petitioners' motion for a stay pending appeal and affirmed the dismissal of petitioners' action. Pet. App. A1-A7. The court held that in acquiring and then selling the Dr. Pepper Building, which came into its hands only because it was pledged as collateral on a defaulted loan made by a failed, federally insured financial institution, the FDIC was acting "as a liquidator with the powers of a receiver" under the provisions of 12 U.S.C. 1823(c) (1988 & Supp. V 1993) and (d)(3)(A) (Supp. V 1993). Pet. App. A2, A6. The court concluded (*id.* at A5-A6) that, under the circumstances of this case, Section 1823(d)(3)(A) extended the anti-injunction provisions of Section 1821(j) to the FDIC's actions in that capacity. See pages 2-3, *supra*. The court rejected (Pet. App. A3-A5 & n.1) petitioners' argument that Section 1821(j) applies only where the underlying claim is subject to the administrative claims procedures set out in 12 U.S.C. 1821(d), as well as their argument that Section 1821(j) cannot be applied unless Congress has provided parties like petitioners with some adequate alternative remedy. Judge Wald dissented on the ground that the court should not have rendered a decision without the benefit of more thorough consideration. Pet. App. A8-A14.

The court of appeals' decision was issued on May 28, 1993. Later the same day, the FDIC completed the sale of the Dr. Pepper building to Dal-Mac.

4. On June 1, 1993, petitioners filed a motion for rehearing and suggestion of rehearing en banc, and the FDIC filed a notice informing the court of the sale of the building. On July 20, the court entered an order to show cause why the case should not be dismissed as moot. Both parties filed responses to the order arguing that the case was not moot. On October 21, 1993, the court discharged the order to show cause, denied the suggestion for rehearing en banc, granted the petition for panel rehearing, vacated the court's prior opinion, and set the case for full briefing and argument. Pet. App. C1; App., *infra*, 1a. Judge Silberman was selected to replace Judge Ruth Bader Ginsburg as a member of the panel. Pet. App. C1 n.*.

In April, 1994, the court reinstated its prior opinion, except for the analysis of this Court's decision in *South Carolina* v. *Regan*, 465 U.S. 367 (1984). See Pet. App. B2. The per curiam lead opinion noted (*id.* at B2-B4) that shortly after the issuance of the original opinion below, the United States Court of Appeals for the Fifth Circuit permitted an injunction action against the FDIC to go forward "in a somewhat different factual setting." Pet. App. B2, citing *Sierra Club, Lone Star Chapter* v. *FDIC*, 992 F.2d 545 (1993). The court pointed out (Pet. App. B3) that the *Sierra Club* opinion questioned whether the FDIC had acted in that case under 12 U.S.C. 1823 or under some other authority, whereas "in this case there is no doubt that the FDIC acquired the Dr. Pepper Headquarters Building pursuant to § 1823," and therefore "no question" that Section 1821 applies. The court also reaffirmed its original conclusion that Section 1821(j)'s immunity from judicial restraint is one of the "rights, powers, privileges, and authorities" incorporated from Section 1821 by Section 1823(d)(3)(A), and rejected any contrary conclusion in *Sierra Club*. Pet.

App. B3-B4. Finally, the court rejected (*id.* at B5 n.2) petitioners' argument that Section 1821(j) did not bar their suit to the extent that it sought declaratory rather than injunctive relief.

In a separate opinion by Judge Wald, the court also revisited its previous rejection of petitioners' argument that Section 1821(j) should not be applied in this case because the elimination of injunctive relief would leave petitioners without an adequate judicial remedy for an alleged violation of federal law. Pet. App. B6-B9; see *id.* at B2. The court found that the exceptionally broad facial sweep of Section 1821(j) justified a resort to other evidence in order to determine the scope that Congress had actually intended for that provision. The court's inquiry disclosed "no evidence" that Congress intended to limit application of Section 1821(j) to cases in which the parties were accorded alternative means to pursue their grievances against the FDIC. Pet. App. B7-B8. The court therefore concluded that Section 1821(j) should be enforced in accordance with its terms. Pet. App. B8. Judge Randolph concurred in that holding for the reasons stated in the court's original opinion. *Id.* at B10; see *id.* at A3 n.1.

ARGUMENT

1. As explained in the Statement (page 5, *supra*), the FDIC has sold the building at issue in this case, and it is therefore no longer in a position to comply with any prior consideration and consultation requirements that the NHPA might impose with respect to that sale. Nonetheless, we agree with the court of appeals' apparent conclusion (App., *infra*, 2a) that the case is not moot.[1]

[1] Petitioners argued below that sale of the property did not moot the case, both because the district court would have jurisdiction to void the sale if petitioners prevailed on the merits,

Petitioner the National Trust for Historic Preservation in the United States alleges that it is a nationwide institutional litigant with an asserted interest in seeking enforcement of the NHPA's requirements with respect to historic properties throughout the country.[2] Compl. 3-4; see generally 16 U.S.C. 468; cf. 16 U.S.C. 470, 470-1. If this case were dismissed as moot, the FDIC expects that the same issues would arise again in connection with its efforts to liquidate assets of other troubled depository institutions, and that the National Trust would seek to litigate them. Because of the relatively short time required to arrange for the sale of any given property, it is also reasonable to expect that such a sale would be completed before any judicial challenge could run its course.

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and because the issue was one capable of repetition but likely to evade review. Appellants' Pet. for Rehearing & Emer. Mot. for Stay Pending Appeal 12-14; Appellants' Memo. Showing Cause Why Case Is Not Moot 4, 9 n.4. The FDIC agreed on the latter ground. FDIC Memo. in Response to Court's Order Regarding Mootness 5-9.

[2] Petitioners' complaint alleges injury and standing on behalf of the National Trust not only on behalf of its members, Compl. 4 (¶ 7), but also "in its organizational capacity." *Id.* at 4 (¶ 6). Whether the Trust's alleged organizational injury would be sufficient by itself to support standing is open to serious question. See, *e.g.*, *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130, 2137-2140 (1992); *Sierra Club* v. *Morton*, 405 U.S. 727 (1972). Because this case was dismissed on the pleadings, however, the Court may presume, for purposes of acting on the petition, that the complaint's allegations "embrace those specific facts that are necessary to support the claim." *Defenders of Wildlife*, 112 S. Ct. at 2137 (quoting *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 889 (1990)).

That result could be forestalled by temporary judicial restraint of the sale, as occurred for a time in this case. For that reason it is doubtful whether the issues involved can be said to "evade review" in the same sense as in controversies involving actions or conditions that by their nature cannot be postponed by an injunction or stay restraining one of the parties. See, *e.g.*, *Southern Pac. Terminal Co.* v. *ICC*, 219 U.S. 498 (1911) (administrative orders of limited facial duration); *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 546-547 (1976) (gag order related to criminal trial); *Sosna* v. *Iowa*, 419 U.S. 393, 398-402 (1975) (one-year residency requirement); *Roe* v. *Wade*, 410 U.S. 113, 125 (1973) (pregnancy); see also 13A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3533.8 & n.12 (1984 & Supp. 1994). The parties in this case are institutions engaged in ongoing courses of conduct, however, and they expect that the legal issues involved will continue to arise in situations with only immaterial factual variations. Under those circumstances, we think that the controversy between them can be considered to be sufficiently concrete and immediate to support the exercise of jurisdiction under Article III, and a declaration of their respective rights under 28 U.S.C. 2201. Cf. *Burlington N.R.R.* v. *Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 436 n.4 (1987) (legislative action specific to particular controversy did not moot recurrent dispute between railroads and union).

2. Petitioners contend (Pet. 10, 15-17) that the decision below conflicts with that of the Fifth Circuit in *Sierra Club, Lone Star Chapter* v. *FDIC*, 992 F.2d 545 (1993). In *Sierra Club*, the FDIC had succeeded to the responsibilities of the former Federal Savings and Loan Insurance Corporation (FSLIC) under an agreement providing that the FSLIC would indemnify the successor

to a failed thrift against capital losses arising from the sale of certain assets, so long as the FSLIC had approved the terms of the sale. *Id.* at 547-548 & n.2. The successor located a purchaser for certain property, and the FDIC approved its sale. The Sierra Club then sought an injunction to require the FDIC to withdraw the approval until the FDIC had evaluated the environmental impact of the sale in accordance with the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* 992 F.2d at 548. The FDIC invoked Section 1821(j) as a bar against the suit. The Fifth Circuit concluded, however, that Section 1821(j) applied by its terms only when the FDIC is "acting as a conservator or receiver," and that neither 12 U.S.C. 1821a(a)(4) (Supp. V 1993) nor 12 U.S.C. 1823(d)(3)(A) "clearly and unambiguously" applied the limits of Section 1821(j) to the factual situation before it. 992 F.2d at 548-549.

The decisions in this case and in *Sierra Club* reflect different approaches to analyzing the availability of injunctive and declaratory relief against the FDIC. As the court of appeals recognized (Pet. App. B3), however, the *Sierra Club* court expressed doubt about whether the factual situation before it implicated Section 1823(d)(3)(A) at all, rather than Section 1821a(a) (4), the analogous but differently worded provision applicable to cases in which the FDIC has succeeded to the functions of the FSLIC. See 992 F.2d at 549-550. In this case, there is no question that the property involved was acquired by the FDIC "pursuant to" Section 1823; and Section 1823(d)(3)(A), unlike Section 1821a(a)(4), refers specifically to the FDIC's "rights, powers, privileges, and authorities * * * as receiver under sectio[n] 1821." Moreover, *Sierra Club* involved the FDIC's decision to consent to the sale of an asset held by a private party. This case, by contrast, involves the actual sale of an

asset held by the FDIC itself. Because Section 1823(d)(3)(A) by its terms refers only to powers of the FDIC "[w]ith respect to any asset acquired or liability assumed" by the FDIC under Section 1823, in a future case the Fifth Circuit might find that difference significant.

The possibility that the Fifth Circuit would agree with the decision below in a case presenting the same facts is underscored by that court's opinion in *Ward* v. *RTC*, 996 F.2d 99 (1993), decided after *Sierra Club*, which twice cited with apparent approval the court of appeals' first opinion in this case. *Id.* at 102 n.8, 104 ("Like the FDIC in *National Trust for Historic Preservation*, the RTC here exercised the powers and functions of a receiver."). Whatever inconsistency exists between the decisions in this case and in *Sierra Club* thus appears to exist also in decisions within the Fifth Circuit itself. It should be resolved by that court in the first instance. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).[3]

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[3] The only other appellate decisions construing the meaning of Section 1823(d)(3)(A) are consistent with the decision in this case. See *GWN Petroleum Corp.* v. *Ok-Tex Oil & Gas, Inc.*, 998 F.2d 853 (10th Cir. 1993) (Section 1823(d)(3)(A) extends to the FDIC in its corporate capacity the bar against non-consensual garnishment proceedings pursuant to Section 1825(b)(2)); *FDIC* v. *American Casualty Co.*, 998 F.2d 404, 409 n.4 (7th Cir. 1993) ("Under 12 U.S.C. § 1823(d)(3)(A), the FDIC in its corporate capacity receives all the rights it possesses in its capacity as receiver when, as occurred here, FDIC-corporate purchases assets from FDIC-receiver."). Those decisions are also consistent with others confirming the broad reach of Section 1821(j) in cases where the FDIC (or the Resolution Trust Corporation) acts purely as a receiver or conservator. See, *e.g.*, *Telematics Int'l, Inc.* v. *NEMLC Leasing Corp.*, 967 F.2d 703 (1st Cir. 1992); *Volges* v. *RTC*, 32 F.3d 50 (2d Cir. 1994) (citing the decisions below in this case); *Gross* v. *Bell Savings Bank*, 974 F.2d 403, 406 (3d Cir. 1992);

3. Petitioners also argue (Pet. 13-17) that the judgment below conflicts with this Court's decision in *South Carolina* v. *Regan*, 465 U.S. 367 (1984), because it would "[l]eav[e] aggrieved parties with no remedy whatsoever" for alleged violations of the NHPA. Pet. 13. In *Regan*, the Court undertook a lengthy review of the history and purposes of the Anti-Injunction Act, 26 U.S.C. 7421(a), which prohibits suits "for the purpose of restraining the assessment or collection of any tax." Based on that review, the Court concluded that Congress did not intend the Act to apply to actions brought by parties for whom Congress had not provided an alternative remedy, such as a refund suit. 465 U.S. at 373-381.

The original panel majority in this case largely confined *Regan* to its own specific statutory context. See Pet. App. A3 n.1. Even under the more expansive reading adopted by the final decision below, however, *Regan* stands at most for the proposition that a court is entitled to look beyond the plain language of a broad anti-injunction statute and to consider whether extrinsic evidence of legislative intent supports a narrowing judicial construction. In this case the court undertook such an inquiry, with the benefit of full briefing and argument, but "uncovered no evidence * * * that § 1821(j) was passed in the 'context of a statutory scheme that provided an alternative remedy,' *Regan*, 465 U.S. at 373, for any and all misfeasance by the liquidating agency, or otherwise bars only actions brought by

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In re Landmark Land Co., 973 F.2d 283 (4th Cir. 1992); *United Liberty Life Ins. Co.* v. *Ryan*, 985 F.2d 1320 (6th Cir. 1993).

parties who have access to an alternative remedy against the agency." Pet. App. B7-B8.[4]

As the court of appeals pointed out in this case (Pet. App. B8), under the statutory scheme applicable to the FDIC, any "private person genuinely aggrieved by * * * unlawful FDIC action could generally bring a suit for damages, or seek administrative redress through the § 1821(d) monetary claims procedure which ultimately includes judicial review." Petitioners lack recourse to administrative and judicial review only because they are attempting to vindicate, not their own financial or property interests, but an asserted responsibility of one federal governmental instrumentality (the FDIC) to consult with another (the Advisory Council on Historic Preservation, see page 4, *supra*) before taking certain actions. Those circumstances reveal a potential clash of federal governmental interests—in protecting the orderly and efficient management of the deposit insurance system, on the one hand, and in insuring proper consideration of the value of historic properties, on the other. Given the clear and imperative language of Sections 1821(j) and 1823(d)(3)(A), however, any further accommodation of those interests must be accomplished

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[4] The history of the FDIC's anti-injunction provisions indicates congressional concern that the FDIC have the ability to carry out its functions without judicial interference, but otherwise provides little guidance beyond that contained in the language of the statute itself. It does not, in any event, indicate a focus on the availability of alternative remedies. See, *e.g.*, S. Rep. No. 1482, 89th Cong., 2d Sess. 14 (1966) (relating to former 12 U.S.C. 1464(d)(6)(C) (1988) (repealed)); H.R. Rep. No. 54, 101st Cong., 1st Sess. Pt. 1, at 334 (1989).

through means other than litigation seeking injunctive relief.[5]

5. Finally, petitioners also contend (Pet. 11) that the decision below conflicts with the decision in *Rosa* v. *RTC*, 938 F.2d 383 (3d Cir.), cert. denied, 112 S. Ct. 582 (1991), on the question whether Section 1821(j) applies in the absence of an alternative remedy. But with respect to Section 1821(j), the plaintiffs in *Rosa* evidently argued only that the actions they asked the court to enjoin violated federal law, and for that reason were not "powers or functions" of the RTC within the meaning of that Section. See 938 F.2d at 397. The court rejected that argument (*id.* at 397-398), and struck down the injunctions in question on the ground that they did indeed interfere with the RTC's discharge of its responsibilities. *Id.* at 398-399. The court did observe, at the end of its analysis (*id.* at 400), that there may be exceptions to anti-injunction statutes, such as the exception recognized by this Court in *Regan*. The court explicitly noted (*ibid.*), however, that it was "not asked to invoke any such exception to the statutory language," and its decision therefore has no bearing on the argument advanced in the petition.

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[5] As the court of appeals noted (Pet. App. B5 n.2, B9), petitioners' claim (Pet. 20) that there is any distinction between declaratory and injunctive relief for purposes of the bar imposed by Section 1821(j) is foreclosed by this Court's decision in *California* v. *Grace Brethren Church*, 457 U.S. 393, 408-411 (1982).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1994

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 93-5137
USDC CV 93-904

NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES; HISTORIC PRESERVATION LEAGUE, INC., A NON-PROFIT CORPORATION PRESERVATION TEXAS, INC., A NON-PROFIT CORPORATION, APPELLANTS

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION; ANDREW C. HOVE, JR., IN HIS OFFICIAL CAPACITY AS ACTING CHAIRMAN, FEDERAL DEPOSIT INSURANCE CORP., APPELLEES

[Filed Oct. 21, 1993]

ORDER

Before: MIKVA, CHIEF JUDGE, WALD, EDWARDS, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG, SENTELLE, HENDERSON, AND RANDOLPH, CIRCUIT JUDGES.

Upon consideration of appellants' suggestion for rehearing en banc, the response thereto, the brief of amicus curiae in support of appellants' petition for rehearing en banc, the court's order to show cause filed July 20, 1993, the responses thereto and the reply, it is

ORDERED that the order to show cause be discharged. It does not appear that the controversy is moot. It is

FURTHER ORDERED that the suggestion for rehearing en banc be denied.

Per Curiam

FOR THE COURT:
Ron Garvin, Clerk

By: /s/ Robert F. Bonner
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

SEPTEMBER TERM, 1992

No. 93-5137

NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES, ET AL., APPELLANTS

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, ET AL., APPELLEES

[Filed May 15, 1993]

Before: WALD AND RUTH B. GINSBURG, CIRCUIT JUDGES.

ORDER

Upon consideration of the emergency motion for stay pending appeal, it is

ORDERED that an administrative stay be entered as follows: Appellees are hereby restrained and enjoined from selling, demolishing, or otherwise disposing of the Dr. Pepper headquarters building pending further order of the court. The purpose of

this administrative stay is to give the court sufficient opportunity to consider the merits of the motion and should not be construed in any way as a ruling on the merits of that motion. *See D.C. Circuit Handbook of Practice and Internal Procedures* 39 (1987).

Appellees are directed to hand-deliver and hand-file a response to the motion for stay by 4:00 p.m. on Sunday, May 16, 1993, and appellants are directed to hand-deliver and hand-file any reply by noon on Monday, May 17, 1993.

Per Curiam

/s/ PMW
/s/ RBG/ml